STATE OF MICHIGAN

IN THE SUPREME COURT

CHANCE LOWERY,

Plaintiff-Appellee,

v.

ENBRIDGE ENERGY, LIMITED PARTNERSHIP and ENBRIDGE ENERGY PARTNERS, L.P.,

Defendants-Appellants.

Docket No. 151600

Court of Appeals No. 319199

Calhoun Circuit Court
LC No. 11-003414-NO
Hon. James C. Kingsley
(succeeded by Hon. Sarah S. Lincoln

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REPLY BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Rules

I. INTRODUCTION

While Lowery struggles mightily to shoehorn this case into the Court of Appeals' decision in *Genna v Jackson*, 286 Mich App 413; 781 NW2d 124 (2009), it simply does not fit. This is not a case in which the circumstances of a plaintiff's exposure to toxic chemicals are such that no expert testimony is needed to demonstrate causation. Lowery did not live in a house with acknowledged levels of toxic mold. Nor did he walk into a room filled with a cloud of pesticides (à la *Gass v Marriott Hotel Services, Inc*, 558 F3d 419 (CA 6, 2009)). Lowery lived more than ten miles downstream from where there was a release of crude oil into the Kalamazoo River, and claims to have experienced headaches, nausea, and vomiting some three weeks later, and more than a week after he says the smell of oil went away. Not only that, Lowery claims that his vomiting was so severe that it led to the rupture of an artery in his abdomen. As the Court of Appeals dissent properly recognized, "whether the fumes released by the oil spill caused plaintiff's vomiting, and whether plaintiff's vomiting in turn caused his abdominal artery to rupture, are not matters within the common understanding of average jurors." (COA Dissent at 1). The Court should grant leave to provide guidance to the lower courts and litigants as to the requirement in toxic tort cases of expert testimony or, at the very least, some evidence permitting a reasonable inference of causation, as opposed to speculation.

II. ARGUMENT

A. Lowery misstates the appropriate standard for reviewing Enbridge's motion for summary disposition.

As an initial matter, Lowery misstates the standard for reviewing motions brought under MCR 2.116(C)(10), asserting that the test is "whether the kind of record which *might be developed* . . . would leave open an issue upon which reasonable minds might differ." (Pl's Opp Br at 13) (citation and internal quotation marks omitted; emphasis added); see also Pl's Opp Br

at 27 ("'Before summary disposition may be granted, the court must be satisfied that it is *impossible* for the claim asserted to be supported by evidence at trial.'") (citation omitted; emphasis added)). This Court expressly overruled that standard more than fifteen years ago in *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999):

> We take this occasion to note that a number of recent decisions from this Court and the Court of Appeals have, in reviewing motions for summary disposition brought under MCR 2.116(C)(10), erroneously applied standards derived from *Rizzo v Kretschmer,* 389 Mich 363; 207 NW2d 316 (1973). These decisions have variously stated that a court must determine whether a record "might be developed" that will leave open an issue upon which reasonable minds may differ, see, e.g., *Farm Bureau Mutual Ins Co of Michigan v Stark,* 437 Mich 175, 184; 468 NW2d 498 (1991); *First Security Savings Bank v Aitken,* 226 Mich App 291, 304; 573 NW2d 307 (1997); *Osman v Summer Green Lawn Care, Inc,* 209 Mich App 703, 706; 532 NW2d 186 (1995), and that summary disposition under MCR 2.116(C)(10) is appropriate only when the court is satisfied that "it is impossible for the nonmoving party to support his claim at trial because of a deficiency that cannot be overcome." *Paul v Lee,* 455 Mich 204, 210; 568 NW2d 510 (1997); *Horton v Verhelle,* 231 Mich App 667, 672; 588 NW2d 144 (1998).
>
> These *Rizzo*-based standards are reflective of the summary judgment standard under the former General Court Rules of 1963, not MCR 2.116(C)(10). See *McCart, supra* at 115, n 4. Under MCR 2.116, it is no longer sufficient for plaintiffs to *promise to offer* factual support for their claims at trial. As stated, a party faced with a motion for summary disposition brought under MCR 2.116(C)(10) is, in responding to the motion, required to present evidentiary proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted. MCR 2.116(G)(4).
>
> Consequently, those prior decisions of this Court and the Court of Appeals that approve of *Rizzo*-based standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10) are overruled to the extent that they do so.

The Court reiterated the point in *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999):

> The plaintiff relies on *Rizzo v Kretschmer*, 389 Mich 363; 207 NW2d 316 (1973), for the proposition that a motion for summary disposition under MCR 2.116(C)(10) is properly granted where it is impossible for the claim to be supported by evidence at trial. In fact, the 1985 amendment of the court rules superseded the standard described in *Rizzo. McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115, n 4; 469 NW2d 284 (1991).

MCR 2.116(G)(4) requires:

> A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.

> Today we clarify the correct legal standard under MCR 2.116(C)(10) because our Court has inconsistently applied the standard since the 1985 amendment of the court rules. . . . The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. [*Id*. at 120-121.]

As *Maiden* explained, "[w]here the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*. at 120.[1]

[1] Although Lowery does not cite either case, it does appear that the "might be developed" standard inadvertently crept back in to two of the Court's recent decisions. See *Bonner v City of Brighton*, 495 Mich 209, 220; 848 NW2d 380 (2014) ("A genuine issue of material fact exists when, viewing the evidence in a light most favorable to the nonmoving party, the record which might be developed ... would leave open an issue upon which reasonable minds might differ."), quoting *Debano–Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013). *Debano-Griffin* in turn quoted the *pre-Smith* case of *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997). There is no indication in either *Bonner* or *Debano-Griffin* of a deliberate intent on the Court's part to return to the defunct *Rizzo* standard. In any event, this case provides an opportunity for the Court to clarify the matter, as the Court of Appeals has also recently cited it. See *Jahnke v Allen,* 308 Mich App 472; ___ NW2d ___ (2014) ("'The trial court cannot grant the defendant's motion unless it is impossible to support the plaintiff's claim at trial because of some deficiency that cannot be overcome.'"), quoting *Lichon v American Universal Ins Co*, 435 Mich 408, 414; 459 NW2d 288 (1990).

B. The extent to which expert testimony is required to establish causation in a toxic tort case is a jurisprudentially significant issue.

Lowery completely misapprehends the causation issue in this case. Enbridge is not "attempting to raise the evidentiary threshold" in toxic tort cases. (See Pl's Opp Br at 15). Under *Skinner v Square D Co*, 445 Mich 153; 516 NW2d 475 (1994), a plaintiff "must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id*. at 164-165. This includes "exclud[ing] other reasonable hypotheses with a fair amount of certainty." *Craig v Oakwood Hosp*, 471 Mich 67, 87-88; 684 NW2d 296 (2004). As courts have widely recognized, in order to do that in toxic tort cases, expert testimony is ordinarily required. Why? Because causation inquiries in those cases are *scientific* in nature. See *Pluck v BP Oil Pipeline Co*, 640 F3d 671, 677 (CA 6, 2011).[2]

Contrary to Plaintiff's assertion, there is nothing unusual or unfair about requiring the assistance of an expert when causation involves scientific assessments that are beyond the common knowledge and experience of jurors. It is no different than showing causation in medical malpractice cases, in which this Court has *repeatedly* held that expert testimony is generally required. See, e.g., *Woodard v Custer*, 473 Mich 1; 702 NW2d 525 (2005); *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411, 429; 684 NW2d 864 (2004). In fact, this Court has long recognized that determining the cause of *any* "physical ailment" ordinarily calls for

[2] In addition to *Pluck*, Enbridge cited a number of federal court decisions recognizing the need for expert testimony to establish causation in toxic tort cases. (See Enbridge's App at 14-15). Plaintiff claims that because some of these cases were not cited in Enbridge's briefing in the trial court and Court of Appeals, its "arguments are waived." That assertion is specious, as Enbridge has consistently argued throughout this case that plaintiff needed expert testimony to demonstrate causation. (See Enbridge's Mot for Summ Disp, pp 8-9 (Tab 9 to Enbridge's COA Br, which is attached to Enbridge's App as Ex B).

expert testimony. See *Lindley v City of Detroit*, 131 Mich 8, 10; 90 NW 665 (1902) ("Ordinarily, the testimony of experts is required to determine the cause of physical ailments.").

Of course, expert testimony may not *always* be required, and Enbridge is not suggesting otherwise. For example, in *Higdon v Kelly*, 371 Mich 238, 247; 123 NW2d 780 (1963), the Court did not believe expert testimony was necessary "to show that 10 to 12 glasses of beer in an afternoon are sufficient to cause intoxication." The same goes for the Court of Appeals' decision in *Genna v Jackson*, 286 Mich App 413; 781 NW2d 124 (2009). Given the unusual circumstances of the plaintiffs' childrens' exposure to admittedly high levels of toxic mold in their home, followed by the immediate onset of symptoms that went away as soon as the children were removed from the home, the Court of Appeals concluded that expert testimony was not needed to demonstrate causation. Cf. *Gass v Marriott Hotel Services, Inc*, 558 F3d 419, 432 (CA 6, 2009) (finding sufficient evidence of causation without expert testimony where the plaintiffs testified "that they were exposed to a visible and pungent cloud of pesticides after Defendants sprayed pesticides in their room while Plaintiffs occupied the room," and where they "began experiencing symptoms within fifteen minutes of their alleged exposure").[3]

But as discussed more fully in Enbridge's application, the facts of *this case* illustrate precisely why expert testimony is needed. Lowery claims to have been exposed to harmful levels of VOCs despite the fact that he lived more than ten miles away from the release site. That distance is significant because the VOCs in the oil would have begun to dissipate into the

[3] In arguing that *Genna* is controlling here, Lowery asserts that "like in *Genna*," Enbridge has not presented any evidence that the VOCs found in crude oil "are not harmful to human health." (Pl's Opp Br at 24). That argument misses the point. As explained in its application, Enbridge does not dispute that the VOCs found in crude oil are *capable* of causing headaches, nausea, and vomiting at sufficient levels of exposure. (See Enbridge's App at 21 n 7). The question is whether *Lowery* was exposed to VOCs at a level sufficient to cause *his* alleged symptoms.

air as the oil traveled downriver.[4] Moreover, Lowery asserts that the vomiting he claims led to the rupture of his gastric artery occurred more than three weeks after the oil leak and more than a week after Lowery said the smell of oil went away. (Enbridge's Application at 6). This lack of temporality, combined with the considerable distance that the oil had to travel before it reached the section of the river where Lowery lived, is precisely why expert testimony is required to demonstrate causation here. What is more, Lowery's alleged headaches, nausea, and vomiting are readily explained (if not more so) by his use of Lamictal and the Vicodin he took right before he starting vomiting the day his gastric artery avulsed – an injury that raises yet another causation issue. (*Id*. at 7-9). As federal courts have widely held, "when there is no obvious origin to an injury and it has multiple potential etiologies, expert testimony is necessary to establish causation." *Brown v Burlington Northern Santa Fe Railway Co*, 765 F3d 765, 771 (CA 7, 2014). This Court should grant leave to address this jurisprudentially significant issue. MCR 7.302(B)(3).

C. A jury can only speculate as to whether Lowery's alleged injuries were caused by exposure to oil vapors.

At the very least, the Court should peremptorily reverse the Court of Appeals majority's decision and reinstate the trial court's order granting summary disposition to Enbridge because

[4] Lowery states that he lived "within yards" of the Kalamazoo River, but his own documentary evidence confirms that it is "[t]he oil nearest the *source of a spill*" that contains "higher levels of some of the more volatile hazardous components." (See congressional testimony of Scott Masten, Ph.D., attached as Exhibit E to Plaintiff's Court of Appeals Reply Br) (emphasis added). Thus, it does not necessarily matter how close to the river Lowery lived. What is key is how close he was to the release site. Lowery also cites the fact that he and others could "smell" oil, but he testified that this was in the first several days after the incident, and that the odor went away a week before his alleged vomiting episode. (See discussion at pp 6-9 of Enbridge's App). Moreover, there is no record evidence indicating what the ability to "smell" oil means, if anything, in terms of VOC exposure. In any event, these are just further examples of why *expert testimony* is needed. As the Court of Appeals dissent properly recognized, a jury is not equipped to evaluate such issues without the assistance of an expert.

there is no evidence permitting a jury to reasonably infer causation. The Court of Appeals majority relied on nothing more than the fact that Lowery "lived in the vicinity of the oil spill," was "aware of an overpowering odor," and claimed to have experienced symptoms consistent with exposure to VOCs. (See COA Op at 3). Here is the *entirety* of the majority's analysis:

> Here, there was a strong enough logical sequence of cause and effect for a jury to reasonably conclude that plaintiff's exposure to oil fumes caused his vomiting, which ultimately caused his short gastric artery to rupture. Plaintiff lived in the vicinity of the oil spill and was aware of an overpowering odor and was aware that "the news just kept saying that headaches and nausea [sic]." A reasonable reading of plaintiff's testimony is that he had an approximately weeklong spell of severe migraines that started the day after the spill and then, approximately a week after that, he experienced a several-days-long bout of vomiting. During a fit of vomiting, plaintiff felt a sharp pain in his abdomen, and it turned out that his short gastric artery (which runs between the stomach and the spleen) had ruptured, requiring surgery. Given the proffered evidence, the claim that the already-adjudged negligence of defendants in the release of oil into the Kalamazoo River caused the artery rupture goes beyond mere speculation. [*Id.*]

As the Court of Appeals dissent properly recognized, this evidence demonstrates nothing more than a "mere possibility of causation," which is not enough to survive a motion for summary disposition. (See COA Dissent at 2, citing *Badalamenti v William Beaumont Hospital-Troy*, 237 Mich App 278, 285-286; 602 NW2d 854 (1999)). As opposed to establishing a "logical sequence of cause and effect," Lowery's "evidence" requires a jury to "speculate on the issue of causation." (*Id.*).[5]

As federal courts from around the country have held, a plaintiff in a toxic tort case has to do more than present evidence of the potential existence of a toxin in the environment, followed by the onset of alleged symptoms consistent with exposure. See, e.g., *Pluck*, 640 F3d at 679 ("[T]he mere existence of a toxin in the environment is insufficient to establish causation without

[5] Lowery asserts that "this argument was never made in the Trial Court" (see Pl's Opp Br at 26), but that is indisputably wrong. The *entire premise* of Enbridge's motion for summary disposition was that without evidence of exposure, Lowery's claims are not sustainable.

proof that the level of exposure could cause plaintiff's symptoms."). Instead, a plaintiff must have at least *some* evidence that he or she was actually exposed to a harmful chemical at a level sufficient to cause the symptoms being alleged. See, e.g., *Wright v Willamette Industries, Inc*, 91 F3d 1105, 1107 (CA 8, 1996) ("At a minimum, we think that there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to have suffered."). Here, *there is no such evidence*, as Lowery's medical expert, Dr. Nosanchuk, admitted that he did not review any of the available air monitoring results or sampling data gathered after the Line 6B incident.[6] This is *fatal* to Lowery's claims. See, e.g., *Pluck*, 640 F3d at 679 (rejecting the plaintiffs' expert's causation opinion and affirming summary judgment because he "did not ascertain Mrs. Pluck's level of benzene exposure, nor did he determine whether she was exposed to quantities of benzene exceeding the EPA's safety regulations").

Lowery is critical of Enbridge's reliance on *Pluck* and other cases recognizing the need for at least some evidence of exposure, asserting that they are "not even relevant because they have to do with plaintiffs who claim to be suffering from diseases, such as lymphoma, liver disease, lung cancer, squamous cell carcinoma, or leukemia." (Pl's Opp Br at 16). While the causal connections in those cases might have been even *more* attenuated, the point is the same – a plaintiff cannot claim injury from exposure to a toxic substance without at least some evidence of exposure. Another Court of Appeals panel recognized as much in *Trice v Oakland*

[6] While Lowery asserts that Enbridge "never argued" in the trial court that there was "air sampling and air monitoring by the EPA" (Pl's Opp Br at 5 n 4), the fact of the matter is that Enbridge repeatedly stressed Dr. Nosanchuk's lack of information concerning Lowery's alleged exposure. And in his deposition testimony, Dr. Nosanchuk specifically acknowledged that he did not review "any specific air monitoring or air sampling data." (Nosanchuk Dep, p 30 (attached at Tab 7 to Enbridge's COA Br)).

Development Ltd, unpublished opinion per curiam of the Court of Appeals, issued Dec 16, 2008; 2008 WL 7488023 (Docket No. 278932), citing some of the *same* cases on which Enbridge relies here. *Id*. at *11 (attached at Tab 17 to Enbridge's COA Br) ("[A]ll of plaintiff's experts acknowledged that the dose of chemicals to which plaintiff had been exposed had not been determined . . . . Furthermore, plaintiff herself acknowledged that she was not aware of any studies of the quantity or duration of any exposure she may have had to any harmful chemicals. Without such testing, it is not certain that plaintiff was exposed to harmful chemicals at all, let alone that she was exposed to chemicals at a dosage or level that would be harmful. At the very least, plaintiff was required to present evidence that she was exposed to some chemical at some level.").[7] Although *Trice* and the majority's decision in this case are unpublished, the disparate results they reached demonstrate the need for this Court's guidance.

The lack of evidence concerning Lowery's potential exposure, if any, to VOCs, is even more striking given the other possible causes of Lowery's alleged symptoms. As discussed more fully in Enbridge's application, Lowery's medical records are replete with references to a history of headaches and nausea that Lowery had long attributed to his use of the antidepressant drug Lamictal, especially when he smoked.[8] And he was so convinced that taking Vicodin

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[7] Among other cases, the *Trice* panel cited both *McClain v Metabolife Int'l Inc*, 401 F3d 1233, 1242 (CA 11, 2005) (observing that causation "requires not simply proof of exposure to the substance, but proof of enough exposure to cause the plaintiff's specific illness"), and *Allen v Pennsylvania Engineering Corp*, 102 F3d 194, 199 (CA 5, 1996) ("Scientific knowledge of the harmful level of exposure, plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiffs' burden in a toxic tort case.").

[8] Lowery makes much of Dr. Nosanchuk's dismissal of Lamictal as a potential cause of his headaches, as well as the deposition testimony of his treating psychiatrist, Anoop Thakur, M.D., who claimed it was "hard to believe" that Lamictal was causing Lowery's headaches. (See Pl's Opp Br at 5). But that is precisely the point of requiring causation to be established by scientifically-reliable testimony from a qualified expert. Dr. Nosanchuk did not provide any explanation whatsoever for his "clinical judgment" that Lamictal was not "a problem." Nor did

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caused him to vomit the day his gastric artery ruptured that he was afraid to take it in the hospital after his surgery. (See Enbridge's App at 7-9). Despite the Court of Appeals majority's assertion that "this only serves to highlight that there are genuine issues of material fact to be resolved by a jury" (COA Op at 3), the Court of Appeals dissent correctly recognized that it instead exposes Lowery's claims as complete speculation.

The same goes for the claimed causal link between Lowery's alleged vomiting and the rupture of his gastric artery. Lowery's *own surgeon* was not willing to speculate about the cause of that injury, and Dr. Nosanchuk once again offered nothing but conclusory and unsupported assertions having no foundation whatsoever in science or medicine. (See Enbridge's App at 32-38). Allowing a jury to engage in the very speculation that Lowery's own surgeon rejected is clearly erroneous and would cause material injustice to Enbridge. MCR 7.302(B)(5).

III. RELIEF REQUESTED

For all of these reasons, and as further discussed in its application, Enbridge requests that the Court grant leave to appeal, or, alternatively, that it enter a peremptory order reversing the Court of Appeals majority's decision and reinstating the trial court's decision granting summary disposition to Enbridge for the reasons stated in the Court of Appeals dissent.

Respectfully submitted,

DICKINSON WRIGHT PLLC

/s/ Phillip J. DeRosier

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Footnote continued from previous page …

Dr. Thakur for that matter. This Court can take judicial notice that the FDA-approved "medication guide" for Lamictal lists both "nausea" and "vomiting" as "common side effects." See <http://www.fda.gov/downloads/Drugs/DrugSafety/UCM152835.pdf> (accessed June 17, 2015); *Chapman v Abbott Labs*, 930 F Supp 2d 1321, 1323 (MD Fla, 2013) (taking judicial notice of FDA-approved label).

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